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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RAYSHON GADISON, Defendant and Appellant.	B285345 (Los Angeles County Super. Ct. No. MA067958)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank Tavelman, Judge. Remanded for resentencing.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Michael C. Keller and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Rayshon Gadison appeals from his judgment of conviction of, among other offenses, two counts of attempted voluntary manslaughter (Pen. Code, §§ 664, 192, subd. (a)) and one count of carrying a concealed firearm in a vehicle (Pen. Code, § 25400, subd. (a)), with true findings on firearm enhancement allegations (Pen. Code, § 12022.5, subd. (a)). Gadison raises the following arguments on appeal: (1) the trial court prejudicially erred in instructing the jury on a "kill zone" theory of liability for attempted murder; (2) the evidence was insufficient to support his conviction for carrying a concealed firearm in a vehicle; and (3) the matter must be remanded for the trial court to correct certain sentencing errors and to consider exercising its discretion to strike or dismiss the firearm enhancements. We affirm the conviction and remand the matter for resentencing.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

In an amended information, the Los Angeles County District Attorney charged Gadison with three counts of attempted willful, deliberate, and premeditated murder (Pen. Code,[1] §§ 664, 187, subd. (a)), five counts of assault with a firearm (§ 245, subd. (a)(2)), two counts of making criminal threats (§ 422, subd. (a)), one count of discharge of a firearm with gross negligence (§ 246, subd. (a)), and one count of carrying a concealed firearm in a vehicle (§ 25400, subd. (a)). It also was alleged that Gadison personally used a firearm in the commission of the attempted murder, assault with a firearm, and criminal

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1 All further statutory references are to the Penal Code.

threats offenses (§ 12022.5, subd. (a)). Gadison pleaded not guilty to each charge and denied the enhancement allegations.

II. The Prosecution's Evidence

A. Shooting at the Gadison Family Gathering

On the evening of February 9, 2016, various members of Gadison's family gathered at the home of his father, Robert, and his aunt, Betty, in Lancaster, California to celebrate a cousin's birthday.[2] Gadison's two sisters, Raesharde and Rayliah, also resided in the home and were present at the gathering. Gadison arrived at the home with his girlfriend, Nikel Hall, his cousin, Rena Holland, and his friend, Coquise Whaley, in a car driven by Whaley. Once inside the residence, Gadison placed a firearm and some marijuana on the dining room table where the family had gathered. Betty felt that Gadison was being disrespectful and told him to get out of her house. Gadison angrily complied and left in Whaley's car with Whaley, Hall, and Rena.

Raesharde and Rayliah then got into an argument because Rayliah blamed Raesharde for Betty telling Gadison to leave. Rayliah called Gadison and his companions and asked them to pick her up. While Rayliah waited outside, Raesharde called her cousin, Marquenaye Holland, and asked her to come to the home. A short time later, Gadison returned with Whaley and Hall in Whaley's car. Whaley parked her car on the street in front of the house and all three occupants got out. Rena drove back in a separate car, and joined Gadison, Whaley, and Hall on the sidewalk. Shortly thereafter, Marquenaye arrived with her two

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[2] For clarity and convenience, and not out of disrespect, we refer to members of the Gadison and Holland families by their first names.

children and parked her car on the street directly behind Whaley's vehicle. Meanwhile, Betty, Raesharde, and other members of Gadison's family came outside and gathered in front of the home.

An argument ensued between Gadison, Betty, Raesharde, and Marquenaye, and soon escalated into a physical altercation. Other family members, as well as Gadison's companions, tried to intervene by separating Gadison from the women. During the altercation, Gadison walked back to Whaley's car and retrieved a gun from inside the passenger compartment. Gadison fired one shot at a group of family members that included Raesharde, Betty, and Marquenaye. He then fired a second shot at Marquenaye, and a third shot up in the air. After firing the third shot, Gadison ran down the street while Whaley, Hall, and Rena got into Whaley's vehicle. Whaley drove her car a short distance before stopping to pick up Gadison. Gadison and his companions then fled the scene together in Whaley's car.

B. Witness Statements to the Police

Immediately after the shooting, Marquenaye, Raesharde, and Rayliah made separate 911 calls. Marquenaye called 911 as she was pursuing Gadison and his companions in her own car. She told the dispatcher that Gadison "shot at [her]." She further stated: "[H]e put the gun right to his sister's head, then he said I'm about to shoot this fat bitch, which is me, and then he shot right by my head, the bullet flew right by my ear with my children right inside the car." In her 911 call, Raesharde also identified Gadison as the shooter, and stated that he "pointed the gun at [her] and he was shooting . . . at people." Rayliah, on the other hand, failed to mention the shooting in her 911 call.

Rather, she reported that Raesharde had a knife and had "just stabbed two people."

Los Angeles Deputy Sheriff Daniel Acquilano interviewed witnesses at the scene shortly after the shooting.[3] During her interview, Marquenaye recounted that, upon arriving at the residence, she saw some of her family members arguing on the sidewalk. When Marquenaye got out of her car, she first heard Betty yell, "Call the police, he's got a gun." Marquenaye saw Raesharde attempting to separate Gadison and Betty, and heard Gadison say, "I'm about to shoot these bitches." Gadison walked to the passenger side of a car and retrieved a gun from inside the car. While standing in front of the car, Gadison fired one shot at Raesharde and Betty as they stood together on the sidewalk. Gadison then walked over to Raesharde, pointed the gun at her head, and told her, "I'll kill you." After making that threat, Gadison walked back to the front of the car, fired one shot at Marquenaye, and one shot into the air.

In her interview with Deputy Acquilano, Raesharde stated that, when Gadison returned to the residence to pick up Rayliah, he and his companions began arguing with Raesharde. During the argument, Gadison fired one shot at Raesharde from the front of his car. Following that shot, Gadison walked up to Raesharde as she stood on the sidewalk and pointed the gun at the side of her head. He then returned to the front of his car and fired one shot at Marquenaye followed by one shot in the air.

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[3] In addition to interviewing witnesses, Deputy Acquilano searched the area around the scene for evidence, and found two expended shell casings on the street.

Deputy Acquilano also attempted to interview Betty at the scene, but she appeared to be intoxicated and was unable to answer his questions. Instead, Betty repeatedly yelled during the interview, "He had a gun, he had a gun."

In response to Rayliah's 911 call about a stabbing at the residence, Deputy Acquilano spoke to Rayliah about her report. She told the deputy that, during the incident, Raesharde went into the house and retrieved a large kitchen knife. Raesharde then came back outside, walked up to Gadison, and stabbed him in the shoulder. In addition to interviewing witnesses at the scene, Deputy Acquilano conducted individual interviews with Whaley, Hall, and Rena after they were arrested and taken into custody. Each of the women told the deputy that Raesharde retrieved a knife from inside the residence and then attempted to stab Gadison.

C. Witness Statements to the Prosecutor

A few weeks after the shooting, the prosecutor conducted audio-recorded interviews with some of the witnesses, including Raesharde and Marquenaye. In her interview, Raesharde stated that, when Gadison returned to the house, he "had so much animosity and hate toward [her]" that he threatened to kill both her and her unborn child. Gadison then physically attacked Raesharde and punched her in the face. After Marquenaye arrived and became involved in the altercation, Gadison "just started shooting." He fired a total of three shots and then told Whaley to go. Raesharde also told the prosecutor that, prior to the shooting, "everybody was near each other" and "crowding right . . . on the rocks" in front of the house. At one point, as Betty stood nearby, Gadison put the gun to Raesharde's head and

said he was going to kill her. Raesharde feared for her life in that moment because she believed his threat.

In her interview with the prosecutor, Marquenaye stated that, when she arrived at the house, Betty told her that Gadison had a gun. Marquenaye confronted Gadison about the gun and they argued. After Gadison made a disparaging remark about Betty's recently deceased husband, Betty began arguing with Gadison, and Marquenaye had to "pull [Betty] back." Gadison and his girlfriend then went to their car to get weapons. Gadison retrieved a handgun from the passenger compartment of the car while his girlfriend grabbed a stun gun. Raesharde "was standing . . . right in front of" Marquenaye when Gadison fired the first shot that went "right by his sister's . . . ear." Following that shot, Gadison walked up to Raesharde, put the gun to her head, and said to her, "[B]itch, I will kill you." He then turned to Marquenaye and threatened to kill her. Gadison aimed his gun at Marquenaye and fired a second shot that "went right past [her] ear." At that time, Marquenaye, Betty, and Raesharde were standing close together. After the second shot, Gadison told his companions, "[Y]ou guys need to leave because I'm about to kill these bitches." He then fired the third shot in the air. When Whaley and her friends took off in Whaley's car, Marquenaye decided to follow them in her own car with her two children in the backseat. Gadison, who was still on foot, pointed his gun at Marquenaye's car, prompting her to tell her children to duck. Gadison then ran down the street and jumped into Whaley's car when she stopped at the corner to let him in. As Marquenaye continued to follow the group in her own car, Gadison jumped out of Whaley's car and ran into a nearby apartment complex.

Shortly before Marquenaye was scheduled to testify at trial, she told the prosecutor in a recorded telephone call that she was "pretty much done with . . . this case," and that she would come to court, but was "not going to be testifying." Marquenaye recounted that Rayliah and her friend had physically attacked her at a Fourth of July gathering because they "don't want [her] to come to court." Marquenaye also stated that Rayliah, Robert, and other individuals had been "harassing [her] the whole time since [she had] been going through this ordeal," and that she was "sick and tired of dealing with it."

D. Percipient Witness Testimony

At trial, the prosecutor called Marquenaye, Raesharde, Betty, and Robert to testify about the shooting. Each of these witnesses, however, either denied that they ever saw Gadison fire a gun, or testified that they could not recall any shooting taking place. Betty was the only one of the witnesses who admitted to hearing gunfire, but she denied seeing Gadison with the gun. The prosecutor thereafter presented evidence of jailhouse calls between Gadison and various friends and family members in which they discussed aspects of the shooting, Gadison's remorse, and whether anyone would testify against him. The prosecutor also offered evidence of the prior statements made by Marquenaye and Raesharde about the shooting, including their testimony at the preliminary hearings.

As presented by the prosecutor, Marquenaye, in particular, gave a detailed account of the shooting during her preliminary hearing testimony. According to Marquenaye's prior testimony, when Gadison went to retrieve his gun from Whaley's car, he told his companions that they needed to leave because "I'm about to kill these bitches." He then added "especially you, you fat bitch"

in reference to Marquenaye. When Gadison pulled out the gun, Marquenaye, Betty, Raesharde, Rayliah, and Robert were standing in a circle about 12 to 15 feet away. Gadison made a cocking motion with the gun and then fired the first shot toward the area where Marquenaye, Betty, and Raesharde were standing less than a foot apart from one another. Following that shot, Robert ran up to Gadison and yelled at him. Gadison's companions also tried to intervene by grabbing him. Gadison broke away, however, and ran up to Raesharde. He argued with Raesharde and slapped her. He then put the gun to her head and said, "Bitch, I'll kill you." Marquenaye was standing right next to Raesharde when Gadison made this threat. Gadison's companions again grabbed him and pulled him back toward Whaley's car. While standing by the car, Gadison fired a shot directly at Marquenaye, who felt a bullet fly past her ear. Gadison then fired a third shot into the air and told his friends to go. As Whaley, Hall, and Rena left in Whaley's car, Gadison ran down the street. Marquenaye followed the group in her own car with her two children. When Gadison pointed his gun at Marquenaye's car as she passed by him, she told her children to duck down.

E. Expert Witness Testimony

The prosecutor also called a firearm expert to testify about the probability of a gunman with no firearm training hitting an intended target. When presented with a hypothetical based on the facts of the case, the expert opined that a gunman firing from 15 to 25 feet away would be highly likely to miss his target. According to the expert, the general rule was that, at a distance of 15 feet, a trained gunman would hit a target with three out of 15 shots, and it would take three rounds to stop the target. On

the other hand, if an untrained gunman placed a firearm against the head of an intended victim and fired, there was a very high likelihood of shooting the victim.

III. The Defense Evidence

The defense called Whaley, Hall, and Rena to testify at trial about the events that occurred on February 9, 2016. Each of these witnesses denied ever seeing Gadison with a gun during the altercation outside the family's home. They each testified, however, that they saw Raesharde attempt to stab Gadison with a knife or other sharp object. The defense also called Rayliah as a witness to the alleged stabbing by Raesharde. Rayliah testified, however, that she did not see Raesharde stab anyone. Rayliah also denied that it was her voice on the 911 call in which she reported that Raesharde had stabbed two people. The parties stipulated that Rayliah did in fact make that 911 call.

IV. Verdict and Sentencing

The jury found Gadison not guilty of attempted murder as to Marquenaye, Raesharde, and Betty, not guilty of the lesser included offense of attempted voluntary manslaughter as to Betty, and not guilty of assault with a firearm as to Betty and Marquenaye's two children. The jury found Gadison guilty of attempted voluntary manslaughter, assault with a firearm, and making criminal threats as to both Marquenaye and Raesharde, guilty of discharge of a firearm with gross negligence, and guilty of carrying a concealed firearm in a vehicle. The jury also found true the allegations that, in the commission of the offenses against Marquenaye and Raesharde, Gadison personally used a firearm within the meaning of section 12022.5, subdivision (a).

The court sentenced Gadison to an aggregate term of 19 years and six months in state prison. Gadison timely appealed.

DISCUSSION

I. Jury Instruction on the Kill Zone Theory

Gadison argues the trial court erred when it instructed the jury on a "kill zone" theory of liability for the attempted murders of Marquenaye, Raesharde, and Betty because the instruction was unsupported by the evidence. Gadison further asserts the alleged instructional error requires reversal of his conviction for the attempted voluntary manslaughter of Raesharde because it is reasonably probable that the jury relied on the kill zone theory in finding Gadison guilty of this crime.[4]

A. Relevant Proceedings

Following the close of the evidence at trial, the prosecutor requested that the jury be instructed on the kill zone theory for the attempted murder charges. In support of this request, the prosecutor stated: "There was evidence introduced during the trial that the defendant made the statement something to the effect of – that 'I'm going to kill these bitches' several times. The reference was to Marquenaye, Raesharde, and Betty. And, in fact, when he fired that first shot, it was on the heels of him

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[4] Cases involving whether a jury was properly instructed on the kill zone theory of liability are currently before the California Supreme Court. (See *People v. Canizales* (2014) 229 Cal.App.4th 820, review granted Nov. 19, 2014, S221958 [jury was instructed with CALCRIM No. 600]; *People v. Sek* (2015) 235 Cal.App.4th 1388, review granted July 22, 2015, S226721 [jury was instructed with CALJIC No. 8.66.1].

making a similar statement. He took aim at the group, and he fired at that group, and further testimony established that these three individuals were standing almost nose to nose within a foot of each other." The prosecutor also asserted: "We do know at a minimum the defendant did have three bullets in his firearm and fired. According to the evidence, he shot three times, and so he did have a concurrent intent at the time he took the first shot towards the group in the kill zone, and he had the ability to kill all three if he chose to shoot three shots."

Defense counsel objected to the requested instruction, arguing that the kill zone theory was not applicable to the case based on the size of the group and the single shot that was fired at that group. With respect to the first shot fired by Gadison, defense counsel stated: "[T]here's a group of five people that we talked about. And even if there is . . . some evidence that there is concurrent intent as to three of the five, there's still just one shot, because where that group is is clear. Based upon the prosecution's case that there is just one shot into – in fact, I think it's Raesharde that says it goes right past her ear. . . . [T]here is just one shot towards whoever is . . . supposedly in that group. . . . [A]nd the testimony that came out at my client's preliminary hearing . . . was there was this almost – a poorly made circle of the five people when the first shot was fired. Based upon the fact, most importantly, there was only one shot fired, it should not support three counts of attempted murder [and] should not support the kill zone."

Citing the California Supreme Court's decisions in *People v. Smith* (2005) 37 Cal.4th 733 (*Smith*) and *People v. Perez* (2010) 50 Cal.4th 222 *(Perez*), the trial court ruled that it would give the requested instruction. The court explained: "[H]ere there is an

argument that there's express malice toward each individual in that group. So I believe the prosecutor's theory is consistent with *Perez* and *Smith*, and so, as such, I will be giving, over the defense objection, the kill zone theory."

The trial court instructed the jury on the elements of attempted murder with CALCRIM No. 600. The version of the instruction given by the court included the following language on the kill zone theory: "A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Marquenaye Holland, Betty Gadison and Raesharde Gadison, the People must prove that the defendant not only intended to kill each of them but also either (1) intended to kill Marquenaye Holland, Betty Gadison and Raesharde Gadison, or (2) intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Marquenaye Holland, Betty Gadison and Raesharde Gadison or intended to kill Marquenaye Holland, Betty Gadison and Raesharde Gadison by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Marquenaye Holland, Betty Gadison and Raesharde Gadison."

B. Governing Legal Principles

The trial court has the duty to instruct the jury "'on the general principles of law relevant to the issues raised by the evidence.'" (*People v. Smith* (2013) 57 Cal.4th 232, 239.) The court "'has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues."'"

(*People v. Alexander* (2010) 49 Cal.4th 846, 920.) When a jury has been instructed on a factual theory unsupported by substantial evidence, the error is one of state law "subject to the reasonable probability standard of harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836-837 [*Watson*]." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214.) Under that standard, reversal is not required "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; accord, *People v. Perez* (2005) 35 Cal.4th 1219, 1233.)

"'The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice – a conscious disregard for life – suffices. [Citation.]' [Citation.] In contrast, '[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*Smith*, *supra*, 37 Cal.4th at p. 739.) "'To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others.' [Citation.]" (*People v. Stone* (2009) 46 Cal.4th 131, 136-137.)

The "kill zone" theory of concurrent intent applies where the defendant, with the intent to kill a specific target, employs a means of attack designed to kill everyone in the vicinity of the target to ensure the target's death. (*People v. Bland* (2002) 28 Cal.4th 313, 329-330 (*Bland*).) In such a situation, the defendant

creates a "kill zone" around the primary victim, and the jury may reasonably infer that the defendant possesses the concurrent intent to kill everyone within the kill zone. (*Ibid.*) "'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.'" (*Id.* at p. 329.) While the trial court may instruct the jury on this "kill zone" theory for attempted murder, the theory "'is not a legal doctrine requiring special jury instructions. . . . Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.'" (*People v. Stone*, *supra*, 46 Cal.4th at p. 137.)

C. The Trial Court Erred in Instructing the Jury on the Kill Zone Theory for Attempted Murder

Gadison contends the trial court improperly instructed the jury that he could be liable for the attempted murder of Marquenaye, Raesharde, and Betty under a kill zone theory. Gadison claims the kill zone theory was inapplicable to his case because the evidence established that he fired only a single shot in the area where the three alleged victims had gathered. The Attorney General asserts the kill zone instruction was proper because the evidence showed that Marquenaye, Raesharde, and Betty were standing close together when the first shot was fired, and the jury reasonably could have inferred from the totality of the circumstances that Gadison intended to kill each of them.

We conclude the trial court erred in instructing the jury on the kill zone theory of liability for attempted murder because the instruction was not supported by the evidence in this case. The

kill zone theory "addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can also be convicted of attempting to murder other, nontargeted, persons." (*People v. Stone*, *supra*, 46 Cal.4th at p. 138.) In the case of a shooting, the theory applies "'where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. [Citation.]' [Citation.]" (*Perez*, *supra*, 50 Cal.4th at p. 232.)

In this case, the prosecutor argued that the kill zone theory applied to the first shot fired by Gadison because that shot was directed at a group of people that included the three targeted victims–Marquenaye, Raesharde, and Betty.[5] In his closing argument, the prosecutor described the factual scenario supporting the kill zone theory as follows: "So here is a rough draft of what we have that happened that night[.] The group of five individuals to the right standing in the rocks in front of the

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[5] Although the evidence showed that Gadison fired a total of three shots, the prosecution did not rely on a kill zone theory for the other two shots because second shot was fired directly at Marquenaye, and the third shot was fired into the air. With respect to the attempted murder of Marquenaye, the prosecutor argued that the jury could find Gadison guilty of this count based on either the first or second shot because Marquenaye was in the kill zone for the first shot, and was the sole intended target for the second shot.

house, those represent Raesharde, Marquenaye, Betty, Rayliah, and Robert. And then there is the defendant. He's either 25 feet away or 12 to 15 feet away. He says something along the lines, 'I'm going to kill these bitches,' and he shoots at that group. Now, the law says that if a defendant was thinking 'I'm going to kill' . . . everybody in that kill zone, then he's guilty for the attempt[ed] murder of everybody. . . . Or if when he aimed at that group, he was thinking 'well, I'm going to kill these two or these three in that group,' then he is guilty of the attempt[ed] murder of those two or three individuals."

The prosecutor continued: "We know that the defendant saying 'I'm going to kill these bitches', 'these bitches' is a reference to Marquenaye, Raesharde, and Betty, which is exactly why you don't see any charges for attempt[ed] murder against Robert or Rayliah, even though both of them are right there in the kill zone with the other three victims. Because, remember, what I have to prove to you for attempt[ed] murder is he took a step, and he was intending to kill somebody. So I can't, with a straight face and good [conscience], come up here and tell you that he was intending to kill Robert and intending to kill his little sister Rayliah when he shot at the group in the kill zone. But I do know that he was intending to kill Raesharde, Betty, and Marquenaye. That is why even though there are five of them, there are only three victims that are named."

The kill zone theory does not apply to this set of facts. As discussed, the theory "is one of concurrent intent—the defendant has the intent to kill a particular target, and the jury can infer from the method employed to attempt killing the primary target a concurrent intent to kill those around the primary target to ensure the primary target's death." (*People v. Medina* (2019) 33

Cal.App.5th 146, 154-155.) For the theory to apply, "there must be evidence of a specific intent to kill everyone in the kill zone surrounding the primary target—not some or most, but everyone." (*Id*. at p. 156; see also *People v. Cardona* (2016) 246 Cal.App.4th 608, 615 ["without evidence that the defendant intended to kill everyone in an area in order to kill the primary target, the kill zone theory is inapplicable"]; *People v. McCloud* (2012) 211 Cal.App.4th 788, 798 ["the kill zone theory applies only if the evidence shows that the defendant tried to kill the targeted individual by killing everyone in the area in which the targeted individual was located"].) Here, the prosecutor did not claim that Gadison had a concurrent intent to kill everyone in the group as a means of accomplishing the killing of one or more targets. To the contrary, the prosecutor expressly disavowed any suggestion that Gadison intended to kill either Robert or Rayliah when he fired his weapon at the group. Instead, the prosecutor's theory was that, of the five people in the kill zone, Gadison had a specific intent to kill three of them because each of those individuals was the intended target of his single shot. However, in the absence of any evidence of a concurrent intent to kill every person in the kill zone to ensure the death of the intended target or targets, a kill zone instruction should not be given. (*People v. Medina*, *supra*, at pp. 155-156; *People v. Cardona*, *supra*, at pp. 614-615; *People v. McCloud*, *supra*, at pp. 799-800.)

In granting the prosecutor's request to instruct the jury on the kill zone theory, the trial court stated that it was relying on the California Supreme Court's decisions in *Smith* and *Perez*. However, neither *Smith* nor *Perez* was a kill zone case. In *Smith*, the defendant challenged the sufficiency of evidence supporting his conviction for two counts of attempted murder based on his

firing of a single bullet into a vehicle in which the two victims were seated. The evidence showed that a woman was driving and that her baby was in a car seat directly behind her when the defendant fired a single shot from behind the vehicle as it was pulling away from the curb. (*Smith*, *supra*, 37 Cal.4th at pp. 742-743.) The defendant claimed the evidence failed to establish that he had a specific intent to kill both victims because he fired only one shot into the vehicle. The Supreme Court disagreed, holding that the "evidence that [a] defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both." (*Id.* at p. 743.) The Court further rejected the defendant's argument that the kill zone theory was controlling, noting that such argument was "founded on the incorrect assumption that all single-bullet cases involving more than one attempted murder victim must be analyzed under a kill zone rationale." (*Id.* at p. 746.) Because there was sufficient evidence to support a finding of express malice toward both victims, the Court declined to consider "under what factual circumstances, if any, the firing of a single bullet might give rise to multiple convictions of attempted murder" based on a kill zone theory. (*Ibid.*, fn. 6.)

In *Perez*, the California Supreme Court considered whether there was sufficient evidence to support a defendant's conviction for eight counts of attempted murder based on his act of firing of a single shot at a group. (*Perez*, *supra*, 50 Cal.4th at p. 229.) The evidence showed the defendant fired one bullet from a distance of 60 feet at a group of eight individuals who were standing less than 15 feet apart from one another. (*Id.* at pp. 226-227.) The Supreme Court held that the facts of the case supported only a

single count of attempted murder even though the eight alleged victims were in relatively close proximity to each other because "[t]he indiscriminate firing of a single shot at a group of persons, without more, does not amount to an attempted murder of everyone in the group." (*Id.* at p. 232.) In so holding, the Court expressly rejected the People's reliance on the kill zone theory to support the multiple attempted murder convictions because "the facts of this case do not establish that defendant created a 'kill zone' by firing a single shot from a moving car at a distance of 60 feet at the group of eight individuals." (*Ibid.*; see also *People v. Stone*, *supra*, 46 Cal.4th at p. 138 [where the defendant fired a single shot at a group of 10 people, the kill zone theory did not apply because there was no evidence that the defendant "'used a means to kill the named victim . . . that inevitably would result in the death of other victims within the zone of danger'"].)

While neither *Smith* nor *Perez* directly addressed whether the kill zone theory of concurrent intent may apply in a single-shot case, both decisions recognized that a defendant's liability for multiple counts of attempted murder based on the firing of a single bullet depends on whether the evidence establishes that the defendant acted with the specific intent to kill each alleged victim. It is not sufficient that the defendant's firing of a single shot at a group of people endangered the life of each person in the group because "shooting at a person or persons and thereby endangering their lives does not itself establish the requisite intent for the crime of attempted murder." (*Perez*, *supra*, 50 Cal.4th at p. 224.) Nor is it sufficient that all members of the group were standing in close proximity to one another because the firing of a single bullet under such circumstances does not, without more, evince "an intent to kill everyone fired upon."

(*Id*. at p. 232.) On the other hand, where the evidence shows that each alleged victim was "directly in [the] line of fire," a jury reasonably could infer that the defendant had a specific intent to kill each of them by firing a single, close-range shot in their direction. (*Smith*, *supra*, 37 Cal.4th at p. 743; see also *People v. Leon* (2010) 181 Cal.App.4th 452, 465 [where the defendant fired a single shot into the right side of a car's passenger compartment, the evidence was sufficient to support a finding of specific intent to kill both the front seat and right back seat passengers, but not the driver]; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 691 [where the defendant fired a single shot at two officers, one of whom was crouched in front of the other, the jury reasonably could have inferred that the defendant intended to kill both].)

In this case, there was evidence that two of the three alleged victims were in the direct line of fire when Gadison fired a single shot at the group. Specifically, in her interview with the prosecutor, Marquenaye stated that, when the first shot was fired, Raesharde was "standing . . . right in front of [her]," and that Betty was "relatively close" by. While this evidence could support a reasonable inference that Gadison intended to kill both Raesharde and Marquenaye by firing a single bullet in their direction, it does not show an intent to also kill Betty with that one shot. Despite that, the trial court instructed the jury on the kill zone theory of attempted murder as to all three alleged victims. In addition, the prosecutor argued to the jury that Gadison intended to kill all three alleged victims by firing a single bullet at the group, and that the kill zone theory applied to each attempted murder count because the three women "were standing together within a foot of each other" when that shot was fired. Under the reasoning in *Smith* and *Perez*, however, the

mere proximity of the alleged victims to one another is not, in and of itself, sufficient to establish a specific intent to kill each of them. On this record, the trial court erred in instructing the jury on the kill zone theory of liability for the three counts of attempted murder.

D. The Instructional Error Was Harmless

In assessing whether the error in giving a kill zone instruction was prejudicial, we must begin by considering the jury's verdicts in this case. Gadison was acquitted of all three attempted murder counts. He also was acquitted of the lesser included offense of attempted voluntary manslaughter as to Betty. He was convicted of attempted voluntary manslaughter as to Marquenaye and attempted voluntary manslaughter as to Raesharde. In arguing that the trial court prejudicially erred in instructing the jury on the kill zone theory, Gadison concedes that the error did not adversely affect the counts involving Betty because he was acquitted on those counts. He also concedes that the error did not adversely affect his conviction for the attempted voluntary manslaughter of Marquenaye because there was overwhelming evidence that he fired a separate shot at Marquenaye after the alleged kill zone shot. Gadison argues, however, that the error requires reversal of his conviction for the attempted voluntary manslaughter of Raesharde because it is reasonably probable that the jury solely relied on the kill zone theory in finding him guilty of this offense. We disagree.

First, as given by the trial court, the kill zone instruction only applied to the attempted murder counts of which Gadison was acquitted. No kill zone instruction was given for the lesser included offense of attempted voluntary manslaughter. The jury also was instructed pursuant to CALCRIM No. 200 that "[s]ome

of these instructions may not apply, depending on your findings about the facts of the case," and that [a]fter you have decided what the facts are, follow the instructions that do apply to the facts as you find them." We presume that the jury understood and followed the trial court's instructions. (*People v. Scott* (2015) 61 Cal.4th 363, 399.)

Second, even assuming that the jury misconstrued the kill zone theory to apply to attempted voluntary manslaughter, the record demonstrates that the jury did not rely on that theory in reaching its verdicts. As discussed, the prosecution's theory was that Gadison could be found guilty of the attempted murder of Marquenaye, Raesharde, and Betty based his act of firing a single shot at their group because all three women were within the purported kill zone. The jury acquitted Gadison, however, of the attempted voluntary manslaughter of Betty, thus indicating that it rejected the theory that Gadison created a kill zone around the three women when he fired a single shot in their direction. If the jury had credited the prosecutor's argument that the close proximity of the women to one another placed each of them within the kill zone, then it would have found Gadison guilty of the attempted voluntary manslaughter of all three women, including Betty. The jury did not do so.

Third, as given by the trial court, the kill zone instruction required the jury to find that Gadison had a specific intent to kill each of the alleged victims. The instruction stated that, "[i]n order to convict the defendant of the attempted murder of Marquenaye Holland, Betty Gadison and Raesharde Gadison, the People must prove that the defendant not only intended to kill each of them but also either (1) intended to kill Marquenaye Holland, Betty Gadison and Raesharde Gadison, or (2) intended

to kill everyone within the kill zone." As explained, the kill zone theory only comes into play where the defendant has a primary target, and the jury reasonably can infer from the nature and scope of the attack that the defendant had a concurrent intent to kill other, nontargeted persons to ensure the target's death. The version of CALCRIM No. 600 given by the trial court, however, identified each of the three alleged victims as both the primary target of the shooting and a secondary, nontargeted person who fell within the kill zone. While the wording of the instruction was confusing, it could not possibly have prejudiced Gadison because it expressly required the jury to find that he intended to kill all three victims to convict him of attempted murder under a kill zone theory. (See *People v. Tran* (2018) 20 Cal.App.5th 561, 567 [where the kill zone instruction identified the alleged victim as both the primary target and the secondary nontargeted victim, any error in giving the instruction was harmless].)

Fourth, contrary to Gadison's contention, there was compelling evidence that he harbored a specific intent to kill Raesharde when he fired a single shot toward the area where she was standing with the other alleged victims. Raesharde told the prosecutor that, when Gadison returned to the residence and got out of the car, he "had so much animosity and hate" toward her that he threatened to kill Raesharde and her fetus. Gadison then attacked Raesharde and punched her in the face. This physical altercation took place shortly before the first shot was fired. Additionally, Marquenaye told the prosecutor that, when Gadison retrieved his gun and fired the first shot, Raesharde was standing right in front of Marquenaye, and the bullet went "right by" Raesharde's ear. Following that shot, Gadison's companions tried to grab him and pull him away, but he was able to break

free. Gadison then immediately ran up to Raesharde, placed the gun against her head, and angrily said to her, "Bitch, I will kill you." Given the totality of this record, it is not reasonably probable that the jury convicted Gadison of the attempted voluntary manslaughter of Raesharde based solely on an unsupported theory. Any error in instructing the jury on the kill zone theory of liability for attempted murder was therefore harmless.

II. Sufficiency of Evidence on the Conviction for Carrying a Concealed Firearm in a Vehicle

Gadison challenges the sufficiency of evidence supporting his conviction in count 20 for carrying a concealed firearm in a vehicle under section 25400, subdivision (a)(1). Gadison contends the evidence was insufficient to support his conviction for this offense because the prosecution failed to establish that Whaley's vehicle was under Gadison's control or direction.

A. Standard of Review

In considering a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even

testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; see also *People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

B. Gadison's Conviction in Count 20 Was Supported by Substantial Evidence

Section 25400, subdivision (a)(1) makes it a crime for any person to carry "concealed within any vehicle that is under the person's control or direction any pistol, revolver, or other firearm capable of being concealed upon the person." To establish the elements of the offense, the prosecution must prove that "the 'defendant carried within a vehicle a firearm capable of being concealed on the person,' the 'defendant knew the firearm was in the vehicle,' the 'firearm was substantially concealed,' and the 'vehicle was under the defendant's control or direction.'" (*People v. Aguilar* (2016) 245 Cal.App.4th 1010, 1017.) Gadison argues the evidence was insufficient to support his conviction for this crime because the uncontroverted testimony established that the vehicle in which he concealed a firearm was under the exclusive control and direction of Whaley. This argument lacks merit.

While it is true that Whaley owned and operated the car in which Gadison concealed his gun, the jury reasonably could have inferred from the evidence that the vehicle was also within

Gadison's direction or control. First, there was testimony that Whaley drove Gadison, Hall, and Rena to his family's home because Gadison had been invited to attend a gathering there. Whaley did not simply drop off Gadison at the home and then leave. Instead, Whaley and the other two women waited outside for Gadison while he went into the home to visit his family. Second, there was testimony that, after Gadison's younger sister, Rayliah, got into a fight with Raesharde about Gadison being forced to leave the home, Rayliah called Gadison to come pick her up. Gadison and his companions then returned to his family's home in Whaley's car so that they could get Rayliah. Third, the evidence showed that, when Gadison retrieved his gun from the passenger compartment of Whaley's car and began firing, Whaley did not get back into the car and drive away. Rather, she and the two other women stayed with Gadison while trying to convince him to leave with them in her car. Fourth, there was evidence that, after Gadison fired the third shot into the air, he told his companions that they needed to go. At that point, Whaley, Hall, and Rena got back into Whaley's car and began driving away while Gadison ran down the street. Whaley then stopped her vehicle at the corner so that Gadison could get in, and when Marquenaye pursued the group in her own car, Whaley again stopped her vehicle so that Gadison could jump out and flee on foot. Based on the totality of this record, Gadison's conviction for carrying a concealed firearm in a vehicle under his direction or control was supported by substantial evidence.

III. Discretion to Strike the Firearm Enhancements

The jury found Gadison guilty in count 1 for the attempted voluntary manslaughter of Marquenaye, and guilty in count 9 for the attempted voluntary manslaughter of Raesharde. The jury

also found true the allegations that Gadison personally used a firearm in the commission of each offense within the meaning of section 12022.5, subdivision (a). At Gadison's September 14, 2017 sentencing hearing, the trial court imposed a term of 10 years for the firearm enhancement in count 1, and a term of one year and four months for the firearm enhancement in count 9.

On October 11, 2017, while this appeal was pending, the Governor signed Senate Bill No. 620, effective January 1, 2018 (Stats. 2017, ch. 682, § 2), amending section 12022.5 to give discretion to the trial court to strike a firearm enhancement in the interest of justice. (See § 12022.5, subd. (c) ["The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law"].) Because Gadison's judgment of conviction is not yet final, the amendment to section 12022.5, subdivision (c), applies retroactively to his sentence. (See, e.g., *People v. Phung* (2018) 25 Cal.App.5th 741, 763; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; see generally *In re Estrada* (1965) 63 Cal.2d 740, 745.) Gadison and the Attorney General agree that remand is appropriate in this case to allow the trial court to exercise its new sentencing discretion whether to dismiss or strike one or more of the firearm enhancements.

IV. Sentencing Errors

At Gadison's sentencing hearing, the trial court stated that, as to count 20, it was imposing a consecutive term of one year for the offense of assault with a deadly weapon in violation of section 245, subdivision (a)(1). Gadison contends, and the Attorney General concedes, that this was error because Gadison was not

convicted of assault with a deadly weapon. Rather, in count 20, Gadison was charged with, and convicted of, carrying a concealed firearm in a vehicle in violation of section 24500, subdivision (a)(1). Therefore, on remand, the trial court must vacate the sentence imposed as to count 20 and resentence Gadison on this count for the misdemeanor offense of carrying a concealed firearm in a vehicle.

The parties further agree that there are two clerical errors regarding Gadison's sentence that must be corrected on remand. First, both the abstract of judgment and the minute order from the September 14, 2017 sentencing hearing incorrectly state that Gadison's sentence in count 9 for the attempted voluntary manslaughter of Raesharde was one year and four months for the underlying offense and one year for the firearm enhancement. As to count 9, however, the trial court imposed a term of one year for the underlying offense and a consecutive term of one year and four months for the firearm enhancement. Thus, on remand, in addition to considering whether to strike the firearm enhancement pursuant to its sentencing discretion under section 12022.5, subdivision (c), the trial court must modify the abstract of judgment and September 14, 2017 minute order to reflect the correct sentence imposed as to count 9. Second, the abstract of judgment omits the sentence imposed as to count 20, which as discussed above, should have been for the misdemeanor offense of carrying a concealed firearm in a vehicle. Therefore, on remand, the trial court must resentence Gadison on count 20 for the correct offense and then modify the abstract of judgment to reflect the sentence imposed as to that count.

DISPOSITION

Gadison's conviction is affirmed, and the matter is remanded to the trial court for resentencing.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.